Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	WT DOCKET NO. 96-41	
	)		
LIBERTY CABLE CO., INC.	)	File Nos.	
	)	708777	(WNTT370)
For Private Operational Fixed Microwave	)	708778, 713296	(WNTM210)
Service Authorization and Modifications	)	708779	(WNTM385)
New York, New York	)	708780	(WNTM555)
	)	708781, 709426, 711937	(WNTM212)
	)	709332	(NEW)
	)	712203	(WNTW782)
	)	712218	(WNTY584)
	)	712219	(WNTY605)
	)	712295	(WNTX889)
	)	713300	(NEW)
	)	717325	(NEW)

MEMORANDUM REGARDING CONFIDENTIAL TREATMENT OF TRANSCRIPT AND TRANSACTION DOCUMENTS

Freedom New York, L.L.C. ("Freedom"), by its undersigned attorneys, submits this memorandum to advise the Administrative Law Judge and the parties that it does not request confidential treatment of the transcript of the hearings held on June 13, 1996 in the above-referenced matter. In addition, Freedom will address herein the question posed by the Presiding Judge's June 21, 1996 Order as to whether the Asset Purchase Agreement, Exhibit K to the Asset Purchase Agreement, Transmission Services Agreement and Subcontractor Agreement (together the "Transaction Documents") submitted by Bartholdi Cable Company, Inc. ("Bartholdi") on May 20, 1996 are required to be made public pursuant to Part 94 of the Commission's Rules. Finally, notwithstanding the fact that the Commission's Rules do not require public disclosure of any of the Transaction Documents, Freedom is sensitive to the Presiding Judge's concern that he

may need to refer specifically to certain portions of the documents for purposes of his determination on the pending motion, and therefore Freedom is willing to waive its claims of confidentiality of the redacted Transmission Services Agreement and Subcontractor Agreement. However, the Asset Purchase Agreement, including Schedule K, is replete with extremely proprietary business information concerning Freedom's ongoing and future operations, the disclosure of which would be extremely competitively harmful. Accordingly, Freedom continues to request confidential treatment of these documents and proposes that the Judge's order on the Motion to Enlarge be issued under seal and the parties given five (5) business days to request that all or part of it be maintained under seal.

I. Confidential Treatment Is Not Necessary for the June 13, 1996 Transcript

Freedom's review of the transcript of the June 13, 1996 Prehearing Conference transcript indicates that it does not contain commercially sensitive and proprietary corporate or competitive information which would require that it be kept under seal. The discussion which took place at the hearing was narrowly focused on structural issues germane to the Motion to Enlarge rather than specific aspects of the Transaction Documents which contain competitively sensitive and proprietary information which goes to the heart of Freedom's business arrangements and marketing plans. Consequently, Freedom does not believe that it will suffer significant competitive disadvantage if the transcript is available to the public.

II. Part 94 Does Not Require the Filing at the Commission or the Public Availability of Any of the Transaction Documents

With regard to the question posed by the Presiding Judge as to whether Part 94 requires any of the Transaction Documents to be filed at the Commission or otherwise made available to

the public, Freedom submits that it does not. The requirements of 47 C.F.R. § 94.17 pertain only to the maintenance of sharing agreements and private carrier agreements in the station records of Part 94 licensees and, while such station records must be "made available at any reasonable time for inspection by an authorized representative of the Commission," 47 C.F.R. § 94.109 (1995), there is no requirement that they be made available to the public. Moreover, while Section 94.31(c) requires that agreements and statements required under Section 94.17 must be filed with applications for new or modified station authorizations "if operation is desired in connection with any cooperative use of the proposed radio communication facilities," that filing requirement does not apply to any of the Transaction Documents. 47 C.F.R. § 94.31(c) (1995).

As a threshold matter, Section 94.17(3) only pertains to sharing agreements and private carrier agreements. 47 C.F.R. § 94.17(3) ("All sharing and private carrier arrangements must be conducted pursuant to a written agreement to be kept as part of the station records."). Freedom has not entered into any sharing arrangements with Bartholdi,[1] and the only Transaction Document which constitutes a "private carrier agreement" subject to Section 94.17 is the Transmission Services Agreement between the two companies.[2] Accordingly, the other

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[1] Freedom and Bartholdi will use certain of the same transmitters pursuant to Section 94.19. *See* 47 C.F.R. § 94.19 (Multiple licensing of radio transmitting equipment in the Private Operational-Fixed Microwave Radio Service). Such use does not constitute a "sharing arrangement" under Section 94.17. Pursuant to Section 94.19's multiple licensing requirements, each company will have its own licenses to operate its own paths from those transmitters, each will have access to the transmitters, and each will be responsible for its own compliance with the operating requirements of the Commission's rules. Moreover, unlike the shared use provisions in Section 94.17, there is no requirement for a written agreement to implement such multiple licensing arrangements.

[2] The Asset Purchase Agreement sets forth the terms of the asset acquisition between Bartholdi and Freedom. Schedule K to that agreement pertains to certain marketing

Transaction Documents which were voluntarily made available to the Presiding Judge and the parties under a protective arrangement, and later filed with the Commission's Secretary under seal, are not subject to any requirement that they be kept as part of the Bartholdi station records.

Moreover, while the Transmission Services Agreement is a private carrier agreement which, pursuant to Section 94.17 must be kept as part of the Bartholdi station records, there is no requirement that such station records be made available to the public. Indeed, the only requirement in Part 94 pertaining to the availability of station records provides that such records must be made available for inspection by an authorized representative of the *Commission* at any reasonable time -- not that they must be made available to the *public*. 47 C.F.R. § 94.109 (1995).

Nor does Section 94.31(c) require that the Transmission Services Agreement be filed with any Bartholdi application for a new or modified station authorization.[3] That Section requires that copies of agreements and statements required under Section 94.17 be filed with applications only "if operation is desired in connection with any cooperative use of the proposed radio communications facilities." 47 C.F.R. § 94.31(c) Here, any applications which have been or may be filed by Bartholdi for network facilities offered to Freedom on a private carrier basis

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arrangements between the two companies. The Subcontractor Agreement provides for the provision of maintenance and technical support services by Freedom for the Bartholdi network. None of these agreements pertain to the rates, terms or conditions for the provision of private carrier transmission services by Bartholdi to Freedom

[3] The new license applications filed by Freedom will not be part of any shared use or private carrier arrangement. Such facilities will be operated by Freedom for its own use and are not in any way subject to the Transmission Services Agreement (or any other agreement, for that matter). There is therefore no basis for any argument whatsoever that the Transmission Services Agreement need be filed as part of any Freedom application for new or modified station authorizations pursuant to Section 94.31(c).

are provided on a for-profit private carrier basis pursuant to the Transmission Services Agreement. There is no "cooperative use" being proposed for such facilities -- Bartholdi is using them for the sole and exclusive purpose of providing private carrier services to Freedom on a for-profit basis.

Accordingly, there is no basis in Part 94 for any disclosure whatsoever of the Asset Purchase Agreement, Schedule K, or the Subcontractor Agreement, and the fact that the Commission's Rules require that the Transmission Services Agreement be kept as part of the Bartholdi station records and made available for inspection by the Commission does not support a conclusion that it must be made public.

III. Notwithstanding That None of the Transaction Documents is Required to be Made Public, Freedom is Willing to Withdraw Its Request for Confidentiality of the Redacted Transmission Services Agreement and Subcontractor Agreement, and Proposes That the Judge's Order on the Motion to Enlarge be Issued Under Seal Pending Review by the Parties as to the Proprietary Nature of References to Other Transaction Documents

Notwithstanding the fact that the Commission's Rules do not require public disclosure of any of the Transaction Documents, Freedom is sensitive to the Presiding Judge's concern that he may need to refer specifically to certain portions of the documents for purposes of his determination on the pending Motion to Enlarge. Freedom is therefore willing to waive its claims of confidentiality as to the minimally-redacted Transmission Services Agreement and Subcontractor Agreement. The Asset Purchase Agreement, including Schedule K, however, is replete with extremely proprietary business information concerning Freedom's ongoing and future operations, the disclosure of which would be extremely competitively harmful.

It is well-settled that the government should not make available to the public information

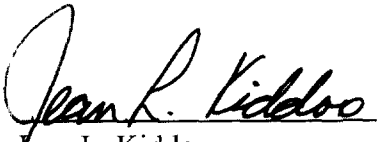
which constitutes "trade secrets and commercial or financial information" which would not "customarily be released" in response to a third party request. 5 U.S.C. § 552(b)(4); *see also, e.g.*, 47 C.F.R. § 0.457(d) (implementing Exemption 4 of the Freedom of Information Act or "FOIA"). Indeed, where information is provided to the government on a voluntary basis (as the Transaction Documents were provided here), the information is "confidential" for purposes of the FOIA "if it is the kind of information . . . that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 878 (D.C. Cir. 1992) (citing *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971). As the Commission has recognized, contractual arrangements and other information submitted by parties should not be disclosed where an anti-competitive effect is likely to result. *See In the Matter of National Rural Telephone Cooperative*, 67 R.R.2d 462, 464 (1990) (finding that disclosure of contractual information could result in substantial competitive harm by providing competitors with key contractual provisions that they could use to tailor competitive strategies which could adversely affect the parties to the transaction). Here, release of the Asset Purchase Agreement and Schedule K would provide Time Warner -- Freedom's direct competitor in the New York market -- with a road map of Freedom's ongoing and future operations and marketing strategy. It would certainly not "customarily" be released by Freedom for any purpose to a third party, and its release to competitors would be particularly harmful.

Accordingly, Freedom continues to request confidential treatment of these documents and to any specific references to them in the Presiding Judge's order. It would be premature, however, for Freedom to request that the Presiding Judge's order on the Motion to Enlarge be kept permanently under seal, since it is not yet available for review. Moreover, it is Freedom's

expectation that, as in the discussion among the participants at the June 13, 1996 hearing, references to documents filed under seal will be specifically tailored to the issues at hand, and will not disclose competitively sensitive information.[4] Accordingly, Freedom requests that, as he did with the June 13 transcript, the Judge issue his order under seal and permit the parties five (5) business days to review the order to determine whether to request that all or part of it be maintained under seal, and three (3) business days for replies, if any.

Dated: June 25, 1996

Respectfully submitted,



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[4] In determining whether the public interest in disclosure is sufficiently compelling to outweigh the individual's interest in privacy of confidential information, the Commission "has adhered to a policy whereby it . . . will not authorize the disclosure of confidential financial information on the mere chance that it might be helpful, but [has insisted] upon a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue." *Jonathan E. Canis et al*, Freedom of Information Act Requests, 76 R.R.2d 834, 835 (1994) (citing *Classical Radio for Connecticut, Inc.* 69 FCC 2d 1517, 1520 n.4 (1978)).

CERTIFICATE OF SERVICE

I, Latonya Y. Ruth, hereby certify that a copy of the foregoing document was served this 25nd day of June, 1996, via facsimile and first class mail upon the following:

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